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No. 07-1295

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IN THE

Supreme Court of the United States

TERRANCE L. LEWIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government does not dispute that the petition for certiorari presents a question upon which the courts of appeals are divided, as acknowledged by the Sixth Circuit's decision in this case. Nor does the government contest that the question of what factors a judge may consider in sentencing a defendant for violation of the terms of supervised release is one of recurring significance in thousands of revocation hearings every year. *See* Pet. 15-17. The Solicitor General nonetheless opposes review, suggesting that the division in the circuits is unworthy of this Court's attention and that this case presents a poor vehicle for resolving the conflict.

Neither argument has any merit. The circuit split is real and enduring. Moreover, the government's assertion that the question presented lacks practical importance is based on an erroneous assumption that the "just punishment" factors Congress separately codified in 18 U.S.C. § 3553(a)(2)(A), and expressly excluded from Section 3583(e), are surplusage, meaninglessly repeating other factors codified elsewhere. At the same time, there is no basis for the government's speculation that the district court's consideration of improper factors had no effect on petitioner's sentence. The government has never argued that any error in this case would be harmless and there is no basis for such a claim in any case.

Finally, there is no prospect that the case will become moot during its pendency in this Court. As it has done in similar circumstances in the past, the Court can and should simply stay petitioner's sentence in granting review.

I. The Government's Attempts To Diminish The Extent And Importance Of The Circuit Split Are Unconvincing.

While not denying the existence of a circuit split, the government nonetheless attempts to minimize the extent of the conflict and to suggest that the case law may be "evolving" toward uniformity. BIO 15. That suggestion does not withstand scrutiny.

1. The government points out that the Ninth Circuit has held that "one of the just-punishment factors" – the seriousness of the offense – "may in fact be considered 'in the course of evaluating the criminal history of the defendant'" so long as it is not the sole or primary basis for the revocation sentence. BIO 13 (quoting *United States v. Simtob*, 485 F.3d 1058, 1062-63 (9th Cir. 2007) (emphasis omitted)). But the government does not deny that the Second and Sixth Circuits, by contrast, place no restriction at all on the consideration of that factor, or that the Ninth Circuit absolutely precludes consideration of the other factors excluded from section 3583(e). Accordingly, the government does not dispute that petitioner's sentence – which was based on *all* of the omitted factors, *see* Pet. App. 11a – would be reversed in the Ninth Circuit.

The Ninth Circuit has thus consistently vacated sentences that would have been affirmed in the Second or Sixth Circuits. *See, e.g.*, *United States v. Simtob*, 485 F.3d 1058, 1063-64 (9th Cir. 2007); *United States v. Barnes*, No. 07-50198, 2007 WL 4227258 (9th Cir. Dec. 3, 2007); *United States v. Ramirez*, 222 Fed. App'x 642, 643 (9th Cir. 2007). As those decisions illustrate, the Ninth Circuit continues to apply its precedent despite conflicting decisions

from other circuits. The government accordingly does not suggest that the Ninth Circuit is likely to reconsider its position without this Court's intervention.

2. The government further recognizes that in *United States v. Crudup*, 461 F.3d 433, 439 (2006), the Fourth Circuit concluded that "in devising a revocation sentence the district court is not authorized to consider" factors omitted from Section 3553(a)(2)(A). *See* BIO 14-15. However, the government argues that this statement does not represent the law of the Fourth Circuit because the issue was not squarely before the court in *Crudup* and because, it says, a subsequent case indicates that the Fourth Circuit has moved to a position "more consistent with the permissive view of the Second and Sixth Circuits." *Id.* 14. Both claims are wrong.

First, in subsequent cases, both published and unpublished, the Fourth Circuit has treated *Crudup* as settling the question and precluding district courts from considering the excluded Section 3553(a) factors. *See, e.g.*, *United States v. Turner*, 241 Fed. App'x 168, 170 (4th Cir. 2007); *United States v. Moulden*, 478 F.3d 652, 656 (4th Cir. 2007).

Second, nothing in *Moulden* – which relied extensively on *Crudup*, *see* 478 F.3d at 656-57 – remotely suggests that the Fourth Circuit has backed away from its prior understanding. *Contra* BIO 14-15. The government does not assert that *Moulden* expressly repudiated *Crudup*'s reading of the statute and whatever indirect hints of a retrenchment the government sees in the opinion have been missed by the Fourth Circuit itself. In a subsequent case that court has directly quoted *Crudup* for the proposition

that "the district court is not authorized to consider whether the revocation sentence 'reflect[s] the seriousness of the offense, . . . promote[s] respect for the law, and . . . provide[s] just punishment for the offense.'" *Turner*, 241 Fed. App'x at 170 (quoting *Crudup*, 461 F.3d at 439).

3. Finally, the government does not contest that the Eleventh Circuit has repeatedly instructed the lower courts in that circuit that consideration of factors omitted from Section 3583(e) is not only permissible, but *required*. *See* Pet. 12-13. That view is inconsistent with the decisions of all of the other circuits to have considered the question.

II. The Question Presented Is Recurring And Important.

The government offers no response to the petition's demonstration that the appropriate factors for consideration in setting a revocation sentence is a frequently recurring question, arising in thousands of cases every year. *See* Pet. 15-17. Instead, the Solicitor General argues that the circuit split is unimportant because it makes little practical difference to actual sentencing practices. BIO 11-12. The government reasons that even if Congress prohibited trial courts from considering the "just punishment" factors directly, that prohibition has limited practical importance because courts can take into account the same considerations under other permissible headings. *Id.* 12.

In fact, Congress plainly did not share the government's belief that the omitted factors meaninglessly repeat what Congress had already required courts to consider elsewhere. Congress not only took care to enumerate the "just punishment"

factors as separate factors in Section 3553(a)(2)(A), but also to exclude them from the list of factors incorporated by reference in Section 3583(e). Although the government says that Congress excluded these factors simply to avoid *requiring* the sentencing court to consider them – an erroneous view discussed below – it offers no explanation for why Congress would have made even *that* choice if it thought, as the government believes, that the omitted factors were already essentially covered by other factors it was requiring the court to consider. That is, why would Congress take pains to avoid requiring the sentencing court to consider the "just punishment" factors yet nonetheless require the court to consider other factors that, the government says, cover essentially the same ground?

To the extent there is arguable overlap between permissible and excluded factors, the answer is not to declare Congress's directives meaningless, but rather to seek an accommodation that gives meaning and significance to all aspects of the statute. *See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). The Ninth Circuit has attempted such an accommodation by holding that a court may consider the seriousness of the present offense to the extent it sheds light on other appropriate factors (such as the "history and characteristics of the defendant") but may not seek to use the revocation sentence primarily as a means of punishing the revocation conduct (which Congress intended to be subject to independent punishment under the criminal code). *Simtob*, 485 F.3d at 1062-63. The government offers no explanation for why such a rule would not provide truly meaningful guidance to sentencing judges. It would direct them to focus their attention on the rehabilitative purposes

of supervised release rather than some perceived need to punish violations of its conditions as if they were violations of the criminal law. Nor does the government provide any evidence to support its assertion that courts given such guidance would not change their actual sentencing practices.

III. This Case Presents An Appropriate Vehicle For Resolving The Circuit Split.

On the same theme, the government argues that this case presents a poor vehicle for deciding the question presented because there is "little likelihood that petitioner's own revocation sentence was adversely affected" by the district court's consideration of omitted factors. BIO 12. The Solicitor General goes even further to assert that even if the Court thought otherwise, it could not use this case to decide the question presented because the case will become moot before the Court could issue a decision. *Id.* at 15-18. Neither argument has any merit.

1. The government did not argue below, and does not argue here, that any error in petitioner's sentencing was harmless. That omission is telling. While the government makes much of the fact that petitioner's sentence fell "very near the low end of the range," BIO 13, it neglects to mention that the government itself, after explaining that the Guidelines recommended a sentence from five to eleven months, proposed "the minimum term of five months" and stated that "we would have no objection to" the time being served in a halfway house. Pet. App. 29a-30a. The government explained that petitioner "has had a good job," and, it admitted,

"these are not the worst offenses we've ever seen in a supervised release context." *Id.* 30a.

The district court likewise recognized that petitioner was "on the right track," Pet. App. 33a, having made exemplary progress toward reintegrating into society, with the exception of his present, relatively minor, violations of the terms of his supervised release. The court did not find, as is so often true in other cases, that petitioner had returned a life of crime. To the contrary, the court told petitioner "You've got a good job. Apparently, you are a good worker. That's to your credit. . . . You apparently are doing well in it." *Id.* 31a. The court also noted approvingly that petitioner was making substantial efforts to be involved in the lives of his children. *Id.* 33a.

Nonetheless the government had argued strongly that "the Court should impose some form of punishment to get [petitioner's] attention." Pet. App. 30a. As described in the petition, Pet. 17-18, there is every reason to believe that the district court's decision to subject petitioner to confinement, and to an extended two-year additional period of supervised release with onerous conditions, was due in large part to its acceptance of that request.

At the very least, in the absence of a claim of harmless error, any uncertainty as to how the district court would have ruled if it had complied with the sentencing statute should not prevent this Court from resolving an important circuit conflict over the meaning of Section 3583(e).

2. The Solicitor General's mootness argument also provides no basis for denying review. The straightforward answer is that this Court can and

should avoid that prospect by staying petitioner's sentence pending the Court's resolution of the case. During the period of the stay, petitioner would not be subject to supervised release. If this Court affirmed the judgment on the merits, the stay would expire and petitioner would be subject to the remaining term of supervised release. *See, e.g., Noyd v. Bond*, 395 U.S. 683, 688-93 (1969) (Court stayed military officer's court martial sentence in order to avoid prospect that completion of sentence would moot petition for certiorari); *see also, e.g., Wise v. Lipscomb*, 434 U.S. 1329, 1334 (1977) (Powell, J., in chambers) (granting stay of civil judgment in part because if "the remedy ordered by the Court of Appeals were effectuated, the issues presented here probably would be mooted"); *New York v. Kleppe*, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) (noting that "[p]erhaps the most compelling" reason for granting a stay "would be to protect this Court's power to entertain a petition for certiorari"); *cf. Calley v. Callaway*, 496 F.2d 701, 702 n.1 (5th Cir. 1974) (noting that such stays are appropriate in habeas context for "short sentences for relatively minor crimes so near completion that extraordinary action is essential to make collateral review truly effective"); *Boyer v. City of Orlando*, 402 F.2d 966, 968 (5th Cir. 1968) (same).[1]

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[1] The traditional criteria for a stay are easily met. "When, as in this case, 'the normal course of appellate review might otherwise cause the case to become moot,' issuance of a stay is warranted" because the "balance of harms favors" the petitioner and because "foreclosure of certiorari review by this Court would impose irreparable harm." *Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (citation omitted). *See also John Doe Agency v. John Doe Corp.*, 488 U.S. 1306, 1309

IV. The Court Of Appeals' Decision Is Wrong.

The government also argues that certiorari in unwarranted because, in its view, the decision below was correct. BIO 8. That assertion is wrong and, in any event, provides no basis for delaying resolution of the circuit split.

Like the Sixth Circuit, the government argues that Congress's express exclusion of the just punishment factors from the list of required considerations in Section 3583(e) simply shows that the provision "*requires* a district court to consider the factors enumerated in Section 3583(e) but *does not require* consideration of other factors" including just punishment factors specifically excluded. BIO 9 (emphases in original). But the government offers no explanation for *why* Congress would have intended to require courts to consider all of the other ordinary sentencing factors, yet provide no direction with respect to the "just punishment" factors. If, as the government contends, Congress believed that it was entirely appropriate for a revocation sentence to punish a violation of the terms of supervision as if it were a violation of the criminal law, Congress presumably would have *required* district courts to consider the need for the sentence to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense."

(1989) (Marshall, J., in chambers) (prospect of mootness creates irreparable injury). Moreover, as described in the petition and this reply, the case presents a question worthy of review and upon which petitioner is likely to prevail. Nor is there any inequity in granting a stay, which would not prejudice the government, particularly given that it sought and received three extensions of time to respond to the petition for certiorari.

18 U.S.C. § 3553(a)(2)(A). It is implausible for the Solicitor General to suggest that Congress was agnostic as to the central purpose of revocation sentencing.

Petitioner, on the other hand, has offered a perfectly sensible explanation for why Congress excluded the "just punishment" factors from consideration in the revocation context: Congress intended the violation of terms of supervision to be treated not as equivalent to a new criminal act, but rather as a breach of trust indicating a need not for criminal punishment but for corrective action to aid in the rehabilitative process supervised release was designed to serve. Pet. 20-23. To be sure, the distinction between a rehabilitative "sanction" and "just punishment" of a criminal offense may be subtle and there are undoubtedly areas of overlap, as reflected by the fact that Congress required revocation courts to consider most (but not all) of the factors considered in sentencing criminal conduct. *See* BIO 10-11. But it is a distinction Congress plainly intended, and one that it believed was meaningful. *See* Pet. 22-23. It is not for the United States, or the court of appeals, to decide that the line Congress drew is "untenable," BIO 10, or unworthy of respect.

The government responds that petitioner's reading disregards the broad discretion generally enjoyed by sentencing courts. BIO 10.[2] But the

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[2] The government's citation to 18 U.S.C. § 3661, *see* BIO 10, is inapt. By its terms, that provision applies only to the sentencing of "a person convicted of *an offense*" (emphasis added). Congress separately codified the sentencing factors for violations of supervised released precisely because it intended to

entire point of Section 3583(e) is to guide and limit that discretion. Precluding a court from considering the need for just punishment does not intrude upon sentencing discretion appreciably more than requiring the court to consider a variety of factors it might otherwise believe unimportant or irrelevant.

Finally, even if the government were right on the merits, granting review in this case to bring uniformity to the revocation process would still be appropriate.

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make a distinction between violations of the terms of supervised release and criminal offenses. Pet. 20-22.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, the petition for a writ of certiorari should be granted and petitioner's sentence stayed pending disposition of the case on the merits.

Respectfully submitted,

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